[27072]
Press of Fremont Payne, Inc.

IN THE

Supreme Court of the United States

October Term—1942.

No. 531

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Executor under the Will of J. WALTER ZEBLEY, deceased; THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Trustee for MADGE F. KURTZ, and as Trustee for WM. B. KURTZ; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Trustee for FLORENCE M. MAGILL, under the Will of CHARLES L. McKEEHAN, deceased; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Executor of the Estate of ANTON W. EICHLER, deceased; ARLEIGH P. HESS; ALFRED HOEGERLE; GEORGE N. FLEMING; ELMER M. BUCKEY, as Executor of the Estate of MORRIS F. MILLER, deceased; ALBERT J. TAYLOR, as Trustee in Bankruptcy for KURTZ BROS.; HOWARD A. SEAVER; THOS. A. BIDDLE & CO.; GEORGE WOLBERT, as Executor for the Estate of CHAS. E. WOLBERT, deceased; ROBT. M. WILSON; CHAS. M. JONES; WALTER K. ZERRINGER; CHARLES F. SCHIBENER,

Petitioners,

AGAINST

JAMES LEE KAUFFMAN, as Executor of the Estate of WILLIAM RHODES DAVIS, deceased; HENRY W. WILSON; JAMES LEE KAUFFMAN; WILLIAM C. BLIND and DAVIS & COMPANY, INCORPORATED, a Nevada corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

C. HORACE TUTTLE,
70 Pine Street,
New York, N. Y.,
Counsel for Respondents.

KAUFFMAN & TUTTLE,
BRUCE R. TUTTLE,
JOHN F. FAULKNER,
Of Counsel.

70 Pine Street,
New York, N. Y.

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Respondents.

THE OPINIONS OF THE COURTS BELOW.

The petition herein is for a writ of certiorari to the Supreme Court of the State of New York under 28

U. S. C. A., §344, subdivision (b), from the order and determination of the Court of Appeals of the State of New York dismissing the petitioners' appeal to that court on the ground that "no substantial constitutional question is involved", the petitioners having appealed to that court from the judgment of affirmance of the Appellate Division, dated March 4, 1942, entered in the office of the Clerk of New York County, on the ground that a constitutional question was involved. The memorandum opinion of the Court of Appeals is reported in 288 N. Y. 625 and the denial of the petitioners' motion for reargument of the appeal or leave to amend the remittitur is reported in 288 N. Y. 734. The Appellate Division of the Supreme Court of the State of New York, First Department, had affirmed the decision of the Special Term of the Supreme Court of the State of New York and its opinion is reported in 263 App. Div. 939. Mr. Justice Leary at Special Term, Part I, of the Supreme Court, New York County, in granting respondents' motion to dismiss the amended complaint of the petitioners, held that full faith and credit must be given to the judgment and mandate of the Supreme Court of Oklahoma (Opinion of Supreme Court of Oklahoma reported 180 Okla. 436). His decision has been affirmed by all the appellate courts of the State of New York.

Questions Involved.

Here, the petitioners attack, as they did in the Supreme Court of Oklahoma, in their several petitions to that court for rehearing and in all the courts of New York, the judgment and mandate of the Supreme Court of Oklahoma, asserting that it was in violation of their right to due process of law under the Fourteenth Amendment to the Constitution of the United States. They urged also in the courts of the State of New York, recognition should

not be given to the mandate on the ground that the Supreme Court of the State of Oklahoma was a corrupt court (Vol. I, p. 464). However, this ground has now been abandoned. Petitioners state their property is being taken without due process of law because they did not have their day in court as the Oklahoma Court was without jurisdiction over the subject matter. Under the cloak of "lack of due process", petitioners seek to attack the judgment of the Supreme Court of Oklahoma as erroneous. This they may not do at this time or in this proceeding.

The respondents contend that, commencing in 1937, petitioners have had many days in court and in courts of their own choosing and, as evidence thereof, the record filed herewith contains the following proceedings in which the petitioners were before the respective courts:

(a) Trial Record in the District Court of Oklahoma in its entirety (Vols. I, II, III, IV, pp. 557-2116);

(b) All of the briefs submitted upon the application to that court for writ of prohibition (Vol. V, pp. 2135-2433);

(c) All of the briefs submitted to the Supreme Court of Oklahoma on the merits (Vols. V, VI, pp. 2459-2749);

(d) Petitioners' two petitions to that court for rehearing and briefs submitted in connection therewith (Vol. VI, pp. 2821-2895);

(e) Petitioners' application to that court for leave to file a third petition for rehearing (Vol. VII, pp. 3616-3628);

(f) Proceedings at Special Term, Supreme Court, New York County (Vol. I, pp. 15, 3630) and the opinion of Mr. Justice Leary rendered at Special Term (Vol. VII, p. 3631);

(g) Order and judgment of affirmance of Appellate Division (Vol. VII, pp. 3649-3650);

(h) Petitioners' appeal to the Court of Appeals of the State of New York on a constitutional question and the remittitur of that court dismissing that appeal (Vol. VII, pp. 3643-3645, 3657);

(i) Petitioner's motion in the Court of Appeals for reargument or, in the alternative, for an order amending the remittitur and the denial of the motion (Vol. VII, pp. 3664, 3691).

There can be no doubt this case does not involve "lack of due process". Further proceedings would be "an abuse of process".

Time Within Which a Petition to This Court Should Have Been Filed Has Expired.

The petition herein, in form, is one for a writ of *certiorari* directed to the Supreme Court of the State of New York because of the taking of petitioners' property without due process of law but, in substance, its purpose is to review on the merits a final judgment and mandate of the Supreme Court of Oklahoma, dated June 21, 1940. It is undisputed in the petition (p. 10) that the petitioners invoked the jurisdiction and power of the courts of Oklahoma and, therefore, those courts had jurisdiction over the person of the petitioners. After reversal by the Supreme Court of Oklahoma of the decision of the District Court, the petitioners, then and there, by their petitions for rehearing and an application for a third petition, asserted that the District Court and Supreme Court of Oklahoma had no jurisdiction. They contended there, as here, that the Bowden and Valerius suit was fictitious and raised no justiciable controversy.

Upon final determination by the Supreme Court of Oklahoma, the petitioners, then, had the opportunity to appeal to this court. Petitioners realized this and filed in the Supreme Court of Oklahoma assignments of error

(Vol. I, pp. 507, 551), apparently preparatory to an appeal to this court. Petitioners, however, abandoned this procedure and collaterally attacked the mandate and judgment of the Supreme Court of Oklahoma in the courts of the State of New York for lack of jurisdiction. The time within which the petitioners could have petitioned this court for a writ of certiorari to the Oklahoma courts to attack the Oklahoma judgment as erroneous has long since expired. They cannot now, under the guise of attacking the judgment of the New York courts, bring up for review the merits of the judgment and mandate of the Supreme Court of Oklahoma. They cannot do now indirectly what they should have done directly two years ago. Under the decisions of this court, the New York courts, as this court now is, are bound by the findings of the Oklahoma courts of the jurisdictional fact that the Bowden and Valerius suit was *bona fide*.

Statement of Facts.

The statement of facts contained in the petition omits certain material facts which are necessary to a determination of the issues herein presented and, for that reason, we set them forth herewith.

Origin of Litigation.

On January 2, 1929, a *default* judgment was entered in the District Court in and for Tulsa County, Oklahoma (hereinafter referred to as the "District Court"), in an action which had been commenced in February, 1924 (Vol. II, p. 825), known as Cause No. 25845, against W. R. Davis (a respondent herein represented by James Lee Kauffman, Executor of his estate). Mr. Davis was not in Oklahoma and was probably in Peru at the time of the entry of such judgment (Vol. III, p. 1333). This judgment, in the sum of $169,123.47, was in favor of one

Wilfred H. Cunningham, Trustee, "for the benefit of Davis Malcona Company, a Corporation and the stockholders thereof" (Vol. I, pp. 23, 259). Thereafter, Davis Malcona Company became defunct (Vol. I, p. 434; Vol. II, p. 1008) and the judgment lay dormant from 1929 until May 1937.

Bowden and Valerius Suit.

At that time N. E. Bowden and George P. Valerius, as stockholders of Davis Malcona Company, filed an independent action in the District Court in which the judgment creditor and all stockholders of Davis Malcona (including these petitioners) were named as defendants. In this action the appointment of a receiver or trustee of the judgment was sought to collect, compromise, sell or otherwise liquidate it (Vol. I, pp. 23, 24, 26, 27). The purpose of this suit was to have a receiver appointed to sell the judgment at public auction to the highest bidder (Vol. III, p. 1119). This was denominated Cause No. 64226 in the District Court. A receiver was appointed, and Cunningham, the judgment-creditor, by his attorney, filed an answer and cross-petition, joining in the prayer for relief (Vol. I, pp. 27, 28-29). On July 17, 1937, the District Court made an order requiring all of the defendants (including these petitioners) to show cause why an offer made by said Bowden to the receiver for the purchase of the judgment should not be accepted. The receiver was ordered to mail a copy of the show cause order to each defendant named in said suit, and the defendants were thereby directed to present their claims in the judgment or the proceeds to be derived from its sale (Vol. I, pp. 29-31). Thereafter, a number of the defendants named in the Bowden and Valerius suit, including some of the petitioners, filed appearances and consented that the prayer of the petitioners be granted

(Vol. I, p. 31). All, save one, of the petitioners filed proofs of claim (Vol. II, p. 1021). On September 13, 1937, judgment was entered by the District Court on the Bowden and Valerius petition as prayed for directing acceptance of the offer of Bowden to purchase the judgment and ordering the sale and assignment of the judgment to one Thornburg, as nominee and confirming such sale (Vol. I, p. 31). The purchase price was paid to the receiver and, by him, distributed pursuant to the District Court's order and, thereafter, Thornburg executed a release and satisfaction of the judgment (Vol. I, p. 32).

Petitioners' Petition of October 22, 1937, in the District Court to Vacate the Judgment Entered in the Bowden and Valerius Suit.

Thereafter about five weeks later and on October 22, 1937, these petitioners came into the District Court and filed their petition in the very same action hereinabove referred to, having been previously commenced by Bowden and Valerius and known as Cause No. 64226,

> "* * * in order to give the court of *primary jurisdiction,* in which said judgment was rendered, opportunity to correct its record in said District Court of Tulsa County, Oklahoma, and to set aside the fraudulent proceedings brought therein * * *" (Italics ours) (Vol. I, p. 253)

and asked the District Court to vacate its order of September 13, 1937 entered in that action, which had directed a sale of the judgment of January 2, 1929 and had confirmed the sale. The Court was also asked by petitioners to expunge the release and satisfaction of said judgment of January 2, 1929 and to cancel and set aside all proceedings had in the Bowden and Valerius action

on the ground that fraud had been perpetrated on the District Court and on the petitioners (including the petitioners herein) (Vol. I, pp. 32-34). The said petition and all papers filed in respect thereof or in opposition thereto were numbered in the very same Cause No. 64226 in the District Court.

The said petition came on for trial in the District Court in May, 1938, and the District Court found the issues in favor of the petitioners and, on May 10, 1938, entered its judgment and order vacating and setting aside the said order of sale and confirmation of September 13, 1937, and expunging the satisfaction and release of the judgment of January 2, 1929 (Vol. I, pp. 36, 50).

Judgment of the District Court Entered on Petitioners' Petition Reversed by the Supreme Court of Oklahoma.

Thereafter, respondent Davis and defendant Thornburg duly appealed to the Supreme Court of Oklahoma, the court of last resort in such State, and the Supreme Court of Oklahoma, by its decision and opinion rendered February 13, 1940 (*Davis* v. *Pennsylvania Company, etc.,* 180 Okla. 436, 103 P (2d) 380), found no fraud under the law of Oklahoma, reversed the judgment of the District Court and reinstated the order of sale and confirmation and the release and satisfaction of the judgment of January 2, 1929 (Vol. I, pp. 20, 45, 51). Thereafter, the petitioners herein filed in said Supreme Court a petition for rehearing and a motion for oral argument thereon, which were denied by said Court on March 19, 1940 (Vol. I, p. 51; Vol. VI, pp. 2821-2894). They, then, filed a second petition for rehearing and motion for oral argument thereon, which were likewise denied by said Court on June 18, 1940 (Vol. I, p. 51; Vol. VI, pp. 2894-2985). Finally, they filed in said Court an

application for leave to file a third petition for rehearing and oral argument thereon, which was likewise denied on June 21, 1940 (Vol. I, p. 51; Vol. VII, pp. 3616-3629), and said Court, thereupon and on the same day, handed down its mandate to the District Court "reversing the judgment of the Trial Court" (Vol. I, pp. 18-19, 50-51). No petition in certiorari was filed in the Supreme Court of the United States, although Assignment of Errors were filed in the Supreme Court of Oklahoma (Vol. I, pp. 507-551).

Institution of the New York Action on February 26, 1938.

After petitioners, on October 22, 1937, had filed their petition in the District Court in Cause No. 64,226, and on or about February 26, 1938, four months later, they commenced the instant suit in New York against the respondents and defendants herein seeking the identical relief sought in their petition filed in the District Court of Oklahoma and alleged the identical fraud as the grounds for the relief prayed. In addition, they sought a judgment based on the Oklahoma judgment of January 2, 1929, against respondent Davis and a judgment against the other respondents for damages for aiding and abetting respondent Davis in perpetrating the alleged fraud (Vol. I, pp. 235-268; Vol. II, pp. 576-627).

The mandate of the Supreme Court of Oklahoma came down before respondents had answered the amended complaint. Thereupon, respondents moved at Special Term to dismiss the amended complaint in this action, pursuant to Rule 107 (5) and (7) of the Rules of Civil Practice on the ground that the amended complaint failed to state facts sufficient to constitute a cause of action in that the judgment sued on had been released and the judgment of the Supreme Court of Oklahoma, holding that there had been no fraud in the proceedings to pro-

cure the release of said judgment, was a final, binding adjudication of all of the issues made by the amended complaint (Vol. I, pp. 15-61). Special Term granted respondent's motion and its decision was affirmed by the Appellate Division. The petitioners then appealed to the Court of Appeals and procured a certificate from Judge Finch, one of the judges of that court, to the effect a constitutional question was involved. Subsequently, the Court of Appeals dismissed the appeal on the ground "no substantial constitutional question is involved" and denied a motion for reargument and for an order amending the remittitur (Vol. VII, pp. 3657, 3691).

Summary of Respondents' Contentions.

This court has no jurisdiction to entertain the petition since in fact no Federal question is involved. The Court of Appeals of the State of New York correctly held the judgment and mandate of the Supreme Court of the State of Oklahoma was entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States since it found the courts of Oklahoma had jurisdiction not only of the subject matter of the action but also of the person of the petitioners. Whether or not the judgment of the Supreme Court of Oklahoma is erroneous is not a Federal question involving due process, since petitioners admittedly have had their day in court not only in the State of Oklahoma but also in the State of New York.

POINT I.

There is no Federal question involved and, therefore, under the decisions of this court there is no jurisdiction to entertain the petition.

It is undisputed that the petitioners on October 22, 1937, filed their petition in the District Court of Oklahoma, in the self same cause as the Bowden and Valerius suit, to cancel and set aside all proceedings had in that suit (Vol. I, p. 253). Judgment was rendered in their favor in the District Court and no attack was, then, levelled by the petitioners against the jurisdiction of the Oklahoma courts. The respondents appealed to the Supreme Court of Oklahoma and that court reversed the District Court and found as a fact that the Bowden and Valerius suit was not fraudulent (Vol. I, pp. 20-42). Thereafter, the petitioners claimed in the Oklahoma Supreme Court itself that the Oklahoma courts had no jurisdiction. They argued

> "There is but one primary question of fact or law in this case, and that is whether the Bowden and Valerius suit was fraudulent in its *nature*, and that fact is conclusively proven by the evidence in this case" (Vol. VI, p. 2934).
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> * * * * *
>
> In connection with this jurisdictional question we ask the court to bear in mind the fact something more is necessary than jurisdiction of the parties and the subject matter. The court must also have jurisdiction to render the judgment it did render" (Vol. VI, p. 2978).

This argument was presented in several forms on several occasions to the Oklahoma Court (Vol. VI, pp. 2688-2689, 2888, 2890, 2912, 2934, 2975, 2978) and was rejected

on each occasion by the Supreme Court of Oklahoma. Thus, that court passed on the jurisdiction of its own District Court and of itself. That decision, whether right or wrong, cannot be collaterally attacked. It might have been questioned if at all on direct appeal but the time within which this question could have been raised has expired. This court so held through Mr. Justice Holmes in the case of *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25, stating (p. 30):

> "That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in *Forsyth* v. *Hammond,* 116 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. *It may be mistaken upon what to it is matter of fact the law of the other state but a mere mistake of that kind is not a denial of due process of law.* * * * Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been taken, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of a man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. * * * But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

Petitioners launched a collateral attack upon the judgment of Oklahoma court in the Supreme Court of New York on the grounds that the Oklahoma courts were without jurisdiction and submitted to the Supreme Court of New York the entire record of the proceedings had in Oklahoma. The courts of New York having decided that the

Oklahoma courts had jurisdiction were, therefore, bound to give full faith and credit to the mandate and judgment of the Supreme Court of Oklahoma. The Court of Appeals specifically found there was "no substantial constitutional question involved" and dismissed the petitioners' appeal. Its decision that the Oklahoma courts had jurisdiction is binding upon the petitioners. They were fully heard in Oklahoma on the very questions they raised in New York, and seek to raise there, and hence, there was no denial of petitioners' alleged constitutional rights.

This court, having established by its decisions that there is no violation of the due process clause even though a state court's decision was erroneous, has no jurisdiction under the Judiciary Act, since no Federal question is involved, to review the determination made by the New York courts.

> "An examination of this question, amongst others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question." *New Orleans Water Works Co.* v. *State of Louisiana,* 185 U. S. 336, 351; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 110-112.

The mere averment of a Federal question is not sufficient to give this court jurisdiction; there must be some fair ground for asserting its existence and it must exist in fact. *New Orleans Water Works Co.* v. *State of Louisiana, supra,* 344; *Hamblin* v. *Western Land Co.,* 147 U. S. 530, 533; *Sawyer, et al.* v. *Piper,* 189 U. S. 155, 157. The petitioners' contention of lack of due process is without merit since, admittedly, they were fully heard, in the regular course of judicial proceedings, both in the courts of Oklahoma and New York.

POINT II.

The courts of the State of New York were bound to give to the mandate of the Supreme Court of Oklahoma full faith and credit under Article IV, Section 1, of the Constitution of the United States.

Fauntleroy v. *Lum*, 210 U. S. 230, 237;
Baldwin v. *Travelling Men's Association*, 283 U. S. 522, 525;
Cromwell v. *County of Sac*, 94 U. S. 351;
Green v. *Van Buskirk*, 7 Wall. 139, 147, 148;
Carpenter v. *Strange*, 141 U. S. 87, 101.

POINT III.

The petitioners, having had their days in court of their own choosing, their argument they have been deprived of their property without due process of law is without merit.

This court said in the case of *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 352-353:

> "The state in this case has secured the forfeiture of the charter of the defendant by means of a judicial decree obtained in a state court which had jurisdiction to give the relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based have been judicially declared and found, and the defendant has had full opportunity for its defense upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture, because of a violation by

defendant of the conditions of its charter, was implied in the very grant of the charter itself. The claim therefore that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to defendant the equal protection of the laws,—cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject-matter, and its decision of the question was conclusive in this case so far as this court is concerned."

Chicago Life Insurance Co. v. *Cherry*, 244 U. S. 25, 30;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 247 U. S. 157, 166;

Reynolds v. *Stockton*, 140 U. S. 254;

Carpenters & Joiners Union v. *Ritter's Cafe*, ... U. S. ...., 62 Sup. Ct. 807, 810.

In all of the decisions cited by the petitioners to sustain their contention that their property was taken without due process of law, the aggrieved party did not have a hearing or a trial upon the merits nor did he petition the courts whose jurisdiction was attacked, as did the petitioners in the case at bar. Thus, petitioners fail to bring themselves within any of those decisions. There is no dispute that petitioners appeared and submitted themselves to the jurisdiction of the Oklahoma courts, appealing to their consideration of the facts, not objecting to their power to proceed and not repudiating their jurisdiction but relying thereon. The logical conclusion of petitioners' argument here is that those courts had jurisdiction just so long as they agreed with them and no longer. As this court said in *Forsyth* v. *Hammond*, 166 U. S. 504, at page 517:

> "• • • If it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other."

Therefore, it is respectfully submitted petitioners' contention that their property was taken without due process of law is without merit.

CONCLUSION.

The Petition for Writ of Certiorari Should Be Denied.

Respectfully submitted,

C. HORACE TUTTLE,
Counsel for Respondents.

KAUFFMAN & TUTTLE,
BRUCE R. TUTTLE,
JOHN F. FAULKNER,
Of Counsel.